IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8952 OF 2004

WITH

WRIT PETITION NO.8953 OF 2004

N. P. Karandikar (since deceased)
through Legal Representatives
1. Mrs. Mandakini Narayanan Karandikar & Ors. ..Petitioners.
Vs.
M/s. Nanji Khimji & Co.
a Proprietary concern through its proprietor
Maganlal Khimji Thakkar ..Respondent.

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Mr. A.K. Abhyankar with Mr. A.R. Patil for the Petitioners.
Mr. A.G. Joshi for the Respondent.

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CORAM: DR. D.Y. CHANDRACHUD, J.

5th June, 2006.

ORAL ORDER :

1. Rule, made returnable forthwith. Counsel appearing for the Respondent waives service. By consent taken up for hearing and final disposal.

2. In these proceedings under Article 227 of the

Constitution an order passed by the competent authority on 7th October, 2004 declining to frame a preliminary issue in regard to the maintainability of proceedings under Section 13A(2)of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 has been called into question.

3. The facts in these two petitions lie in a narrow compass and are as under :

Some time in the year 1995, the Respondent instituted a suit (Special Civil Suit 767 of 1995) against Shri. N.P. Karandidar, the predecessor in interest of the Petitioners. In the suit a case was set up that the defendant thereto who was the owner of certain immovable property comprised in CTS Nos.48, 48A, 49, 50 and 51 at Kharkar Ali, Thane, entered into an oral agreement under which an amount of Rs.8 lacs was fixed as consideration for the purchase of the property. The defendant, it was contended, was to be provided with a bungalow on a plot of land admeasuring 500 sq. yds. together with three shops and in the interregnum he was to be provided with two flats, free of charge till he moved to the bungalow. The contention of the Respondent was that the defendant was liable to vacate the two flats, bearing flat Nos.A-21

and A-22 which were provided to him immediately upon his occupying the bungalow. It was pleaded that the defendant had taken over possession of the bungalow on 1st June, 1992, but that he failed to vacate the two flats. Hence, according to the Respondent, the possession of the defendant with effect from 1st June, 1992 was treated as that of a licensee and his licence was terminated by a notice dated 4th April, 1995. After the period of notice was over, the Respondent stated that he had filed an application before the competent authority at Bandra for possession of the two flats. The suit in question was instituted for specific performance of the oral agreement between the parties. In the alternative, a claim for damages in the amount of Rs.1,16,52,000/- was made. It may be noted here that the claim included a claim in the amount of Rs.26 lacs representing the cost of the two flats.

4. The suit instituted by the Respondent was dismissed on an application moved by the original defendant under Order 7 Rule 11 of the Code of Civil Procedure, 1908 on 6th November, 2001. The order of dismissal, it is common ground, has not been challenged. The Respondent had some time prior to the institution

of the suit moved applications under Section 13A(2) of the Bombay Rent Act seeking possession of the two flats in dispute viz. Flat Nos.A-21 and A-22. At this stage, it would suffice to note that the pleadings on the basis of which possession was sought were substantially the same as those forming the basis of the suit for specific performance. As in the suit for specific performance, in the application under Section 13A(2), there was an averment to the effect that the original opponent was bound to vacate the flats upon being placed in possession of the bungalow and upon his failure to do so, the two flats were treated as on leave and licence with effect from 1st June, 1992. Therefore, from the pleadings as they stand, it is apparent that the case of the Respondent was that the original opponent was placed in occupation of the two flats for such period as the bungalow which was to be handed over to him was not complete. The case of the Respondent was that thereafter upon the opponent taking possession of the bungalow he was liable to hand over possession of the two flats.

5. The original opponent filed a written statement controverting the contents of the application made before the competent authority under Section 13A(2) of the Rent Act. The

defence of the opponent was that there was no licence agreement between the parties. The maintainability of the proceedings was questioned. The competent authority passed an order of eviction which came to be challenged before this Court in a civil revision application (CRA 463 of 2003). By its order dated 4th August, 2003 this Court allowed the revision and accepted the grievance of the revision petitioner that the competent authority had in declining to grant permission for cross examination acted with material irregularity. The proceedings were therefore remanded to the competent authority. Issues have been framed before the competent authority on 7th August, 2004 and the first issue is as to whether the application that was filed under Section 13A(2) of the Rent Act is maintainable. The Petitioners moved an application before the competent authority praying that the issue of maintainability be decided as a preliminary issue. That application was dismissed by the impugned order dated 7th October, 2004. The competent authority held that it is just and proper to decide the issue of jurisdiction together with the other issues.

6. Counsel appearing for the Petitioners has submitted that the application filed before the competent authority proceeds ex

facie on the case as set out by the Respondent. The contention is that the Respondent instituted a suit for specific performance or, in the alternative, for damages and the claim for damages included the cost of the two flats, flats A-21 and A-22 which were valued at Rs.26 lacs. That apart, it was submitted that a reading of the averments in the application under Section 13A(2) would demonstrate that no licence agreement is set up on the date on which the original opponent was placed in possession. Even according to the Respondent, it was after the original opponent did not vacate the flats after he was placed in possession of the bungalow that the developer (the Respondent herein) treated those flats as having been given to the predecessor in interest of the Petitioners on leave and licence basis. In these circumstances, it was submitted that a preliminary issue ought to have been framed: No disputed questions of fact arose and the issue was proposed to be pressed solely on the basis of the case set up by the Respondent on the pleadings.

7. On the other hand, it has been urged on behalf of the Respondent that (i) Section 44 of the Maharashtra Rent Control Act 1999 provides for a remedy of a revision before the State

Government and (ii) that under the provisions of Section 43(5) of the aforesaid Act, the competent authority is required to follow the practice and procedure of a Court of Small Causes including the recording of evidence while holding an enquiry in proceedings to which Chapter VIII applies. It was urged that the rules which have been framed under the Presidency Small Causes Courts Act, 1882 in the year 1968 by this Court expressly provide that Rules 1, 2 and 4 of Order XIV of the Code of Civil Procedure shall stand omitted. Hence, it is submitted that it was not open to the competent authority to frame a preliminary issue. Counsel therefore urged that there was no jurisdictional error. Finally, reliance was placed on the earlier order of this Court dated 4th August, 2003 in the revisional proceedings.

8. In so far as the first submission is concerned, it would be material to advert to the provisions of Section 31F of the Rent Act of 1947. Part II A of the old Rent Act was inserted by amendment, viz. Maharashtra Act 18 of 1987. Simultaneously, therewith the State legislature introduced 13A1 to provide for a special procedure for eviction in respect of premises given out on rent by members of the Armed Forces of the Union; scientists or their

successors-in-interest; and Section 13A2 which was to govern cases where a licensee in possession or occupation does not deliver possession of the premises to the landlord on the expiry of the period of licence. Part II A laid down the procedure for the disposal of such applications by the competent authority under Section 31B. Section 31E(5) provides that the competent authority shall, while holding an inquiry, in a proceeding to which this Part applies, follow the practice and procedure of the Court of Small Causes, including the recording of evidence. Under Section 31F it was enunciated that no appeal would lie against an order for the recovery of possession of any premises made by the competent authority in accordance with the procedure specified in Section 31E. A revision was, however, provided to the High Court under sub section (2) of Section 31F in respect of an order passed by the competent authority under Section 31E. The provisions of Section 31E inter alia require a tenant or licensee, as the case may be, to obtain the leave of the competent authority to contest the application and it is only thereupon if leave is granted that the application can be defended on merits. The competent authority shall thereafter adjudicate upon the application by passing a final order thereon. The Maharashtra Rent Control Act of 1999 came

into force on 31st March, 2000. Section 58 of the new Act provides for repeals and savings. The Rent Act of 1947 stands repealed. Sub section (2) of the repealing provision is, however, material and clauses (a) and (b) thereof provide as follows :

> "(2) notwithstanding such repeal-
>
> (a) all applications, suits and other proceedings under the said Acts pending, on the date of commencement of this Act before any Court, Controller, Competent Authority or other office or authority shall be continued and disposed of, in accordance with the provisions of the Acts so repealed, as if the said Acts had continued in force and this Act had not been passed ;
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> (b) the provisions for appeal under the Acts so repealed shall continue in force in respect of applications, suits and proceedings disposed of thereunder."

Thus, it is abundantly clear that all applications, suits and proceedings pending under the old Act on the commencement of the new Act shall be continued and disposed of in accordance with the provisions of the old Act so repealed. Moreover, the provisions for appeal under the Act so repealed shall continue in force in respect of applications, suits and proceedings disposed of thereunder. Under the Act of 1947 no appeal was provided against

an order passed by the competent authority under Section 31E. Under the new Act a revision has been provided before the State Government by Section 44 against an order made by the competent authority under Section 43. Section 44 provides that no appeal shall lie against an order for the recovery of possession made by the competent authority in accordance with the procedure specified in Section 43. Section 43 in turn contemplates that the tenant or licensee would not be permitted to defend the proceedings unless an affidavit is filed stating the grounds on which he seeks to contest the application for eviction and leave is obtained from the competent authority. The competent authority is thereafter empowered to pass an order upon the application. In the background of these provisions, it is clear that there is no merit in the first submission which has been urged on behalf of the Respondent. The present application was instituted in the year 1995 when the old Act held the field and the application has to be continued and disposed of as if the Rent Act of 1947 has not been repealed.

9. In so far as the second submission is concerned, it would be necessary to advert to the relevant provisions of law. Section 7

of the Code of Civil Procedure, 1908 makes certain provisions in regard to the applicability of the Code to the Provincial Small Causes Courts. Section 7 is as follows:

> "7. Provincial Small Cause Courts – The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887 (9 of 1887), [or under the Berar Small Cause Courts Law, 1905], or to Courts exercising the jurisdiction of a Court of Small Causes [under the said Act or Law], [or to Courts in [any part of India to which the said Act does not extend] exercising a corresponding jurisdiction], that is to say, -
>
> (a) so much of the body of the Code as relates to-
> (i) suits excepted from the cognizance of a Court of Small Causes;
> (ii) the execution of decrees in such suits;
> (iii) the execution of decrees against immovable property; and
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> (b) the following sections, that is to say, -
> section 9,
> sections 91 and 92,
> sections 94 and 95 [so far as they authorize or relate to -
> (i) orders for the attachment of immovable property;
> (ii) injunctions;
> (iii) the appointment of a receiver of immovable property; or
> (iv) the interlocutory orders referred to in clause (e) of section 94],
>
> and
> sections 96 to 112 and 115."

10. On the other hand, Section 8 of the Code makes the following provisions in regard to the applicability of the provisions of

the Code to proceedings in the Presidency Small Causes Courts established in Calcutta, Madras and Bombay :

> "8. Presidency Small Causes Courts – Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, [77, 157 and 158], and by the Presidency Small Cause Courts Act, 1882 (15 of 1882), the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay :
>
> [Provided that -
>
> (1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notification in the Official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Causes Courts Act, 1882 (15 of 1882), and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court;
>
> (2) all rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882 (15 of 1882), shall be deemed to have been validly made.]"

11. What these provisions demonstrate is that in respect of the Provincial Small Causes Courts constituted under the Provincial Small Cause Courts Act, 1887, Section 7 of the Code specifically, delineates those provisions of the Code which shall not extend to such Courts. On the other hand, in respect of the

Presidency Small Causes Courts established under the Presidency Small Causes Courts Act, 1882 for Calcutta, Madras and Bombay, Section 8 of the Code provides that the entire body of the Code shall not extend to any suit or proceeding in such Court. However, by virtue of the proviso to Section 8, the High Courts at Calcutta, Madras and Bombay are empowered by a notification to direct that such provisions of the Code as are not inconsistent with the express provisions of the Presidency Small Causes Courts Act, 1882 shall extend to suits or proceedings with such modifications and adaptations as may be specified. The Rules made by these High Courts are deemed to have been validly made. Section 9 of the Presidency Small Causes Courts Act of 1882 lays down that the High Court may frame rules prescribing the procedure to be followed and the practice to be observed by the Small Causes Courts either in supersession of or in addition to any provisions which were prescribed on or before 31st December, 1894. In exercise of the rule making power, the High Court of Bombay framed the Presidency Small Causes Court Rules. The Rules were substituted by a notification dated 21st November, 1968. Sub rule (2) of Rule 1 provides as follows :

> "(2) The portions of the Code of Civil Procedure, 1908 (Act V of 1908), as modified from time to time by any competent legislature in its application to the State of Maharashtra, with its First Schedule as amended by the High Court of Judicature at Bombay under Section 122 of the said Code from time to time upto 1st May, 1968, specified in the first column of the Schedule hereto annexed shall, subject to the additions alterations and modifications specified in the second and the third columns of that Schedule, extend and shall be applied to the Small Cause Court, and the procedure prescribed thereby shall be the procedure to be followed in the Court in all suits cognizable by it except where such procedure is inconsistent with the procedure prescribed by any specific provisions of the Presidency Small Cause Courts Act, 1882."

12. In so far as is material it may be noted that the Schedule to the Rules inter alia provides that Rules 1, 2 and 4 of order XIV of the Code of Civil Procedure shall stand omitted. It is on the basis of these Rules that it has been urged on behalf of the Respondent that the Controller was required to follow the practice and procedure of the Court of Small Causes under Section 31E(5) of the old Rent Act which corresponds to Section 43(5) of the Rent Act of 1999. It was urged that a preliminary issue of jurisdiction could not be framed since Rules 1, 2 and 4 of Order XIV of the Code of Civil Procedure stand omitted by the Rules.

13. The Presidency Small Causes Courts Act, 1882 inter alia provides that subject to the exceptions in Section 19, the Small Causes Courts shall have jurisdiction to try all suits of a civil nature, provided the amount of value of the subject matter does not exceed Rs.25,000/- and if certain other conditions, not material for the purposes of the present proceedings, in regard to jurisdiction are complied with. Originally, the jurisdiction of the Small Causes Courts was to the extent of suits of a valuation not more than Rs.2,000/-. The pecuniary jurisdiction was enhanced in 1987 to Rs.25,000/-. Section 19 of the Act, however, enunciated cases where the Small Causes Courts will have no jurisdiction and clause (d) thereof provided for suits for the recovery of immovable property. Chapter VII of the Act came to be substituted by Maharashtra Act XIX of 1976 with effect from 1st July, 1976. By and as a result of the amendment it came to be provided in Section 41 that the Court of Small Causes under the Act shall have jurisdiction to entertain and try all suits or proceedings between a licensor and licensee, and a landlord and tenant relating to possession of any immovable property situated in Greater Bombay or relating to the recovery of any licence fee or charges or rent therefor, irrespective of the value of the subject matter of said suit

or proceeding. Section 43 of the Act which forms a part of Chapter VII specifically provides that in all suits, appeals and proceedings under the Chapter, the Small Causes Court shall as far as possible and except as otherwise provided follow the procedure prescribed by the Code of Civil Procedure, 1908. Consequently, in respect of proceedings between a licensor and licensee or a landlord and tenant for the recovery of possession of immovable property situated in Greater Bombay or relating to the recovery of licence fee, charges or rent, the Small Causes Court is required to follow the procedure prescribed by the Code of Civil Procedure, 1908 as far as possible and except as otherwise provided. The Rules that were framed by this Court in 1968 were before the amendment of the Presidency Small Causes Courts Act in 1976 by which the new provisions of Chapter VII came to be substituted. Section 43 specifically provides that the Code of Civil Procedure, 1908 shall govern proceedings under Chapter VII and is a statutory provision which must prevail. Indeed Rule 1(2) provides that where specific provisions as to procedure are made in the Presidency Small Causes Court Act, 1882, those made in the Act shall apply. The provisions contained in the Rules framed by this Court in pursuance of the rule making power under Section 9 cannot

therefore apply to suits of the nature specified in Chapter VII of the Act. Section 31E(5) of the Bombay Rent Act of 1947 and the corresponding provision contained in Section 43(5) of the new Act of 1999 require the competent authority while holding an enquiry to follow the practice and procedure of the Court of Small Causes. The proceedings before the competent authority will therefore be governed by the same provisions which govern the procedure of the Small Causes Court. In respect of applications for the recovery of possession between a landlord and tenant or between a licensor and licensee under Chapter VII of the Act of 1882, the Code of Civil Procedure, 1908 is squarely made applicable and the applicability of the Code has not been excepted in respect of proceedings before the competent authority under Section 13A(2) of the Rent Act. In the absence of a specific exclusion the provisions of the Code cannot stand excluded.

14. The Bombay Rent Act of 1947 empowered the State Government to frame rules for the purpose of giving effect to the provisions of the Act, in Section 49(1). Pursuant thereto the State Government framed the Bombay Rents, Hotel and Lodging House Rates (Control) Rules, 1948. Chapter V of those rules provides for

the procedure to be followed by the Court of Civil Judge (Junior or Senior Division) in suits and proceedings and by the District Courts in appeals. Rule 10 deals with suits relating to the recovery of rent or charge when the amount or value does not exceed Rs.500/- and proceedings for execution in such suit or proceeding. Rule 11 lays down the procedure in applications for fixing standard rent. Rule 12 provides that in suits and proceedings other than those referred to in Rules 10 and 11, the Court of Civil Judge (Junior Division or Senior Division) shall follow, as far as may be, and with the necessary modifications, the procedure prescribed for a Court of first instance by the Code of Civil Procedure 1908. The provisions of Chapter V will thus demonstrate that in respect of a suit other than of a nature governed by Rules 10 and 11 of the Rules of 1948, the Court of the Civil Judge, Junior Division or as the case may be Senior Division is required to follow as far as may be the procedure prescribed by the Code for a Court of first instance.

15. In these circumstances, the contention of the Respondent that the Controller was precluded from framing a preliminary issue as regards his own jurisdiction is clearly unfounded. Firstly, the submission proceeds on the basis that it is

the Presidency Small Causes Courts Act, 1882 which would be the governing provision. In the facts of the present case, this assumption is clearly erroneous since the property is situated at Thane. Secondly, the submission ignores the vital distinction made by the Code of Civil Procedure between the applicability of the Code to the Presidency Small Causes Courts and to the Provincial Small Causes Courts. Whereas the Code provides that certain specified provisions of the Code shall not apply to the Provincial Small Causes Courts, Section 8 provides that only such provisions of the Code which are applied by Rules framed by the High Courts in the erstwhile Presidency towns shall apply to Presidency Small Causes Courts. Thirdly, even as a matter of construction, the interpretation placed by the Respondent upon the provisions of the Rules framed by this Court in 1968 under Section 9 of the Presidency Small Causes Courts Act, 1882 is erroneous. Chapter VII of the Act of 1882 was inserted by legislative amendment in the year 1976 and Section 43(5) specifically provides for the application of the provisions of the Code to proceedings under Chapter VII. Hence, once the parent legislation has applied the provisions of the Code to proceedings in a suit under Chapter VII, that provision will prevail. The Rules of 1968 do not lead to a

contrary construction. Finally, Rule 12 of the rules of 1948 which have been framed under the Rent Act clearly provides that in respect of a suit or proceeding before a Civil Judge of the Junior Division or Senior Division, (other than under Rule 10 or Rule 11) the provisions of the Code as far as may shall apply with necessary modifications.

16. In so far as the merits of the Petitions are concerned, at this stage it will suffice to note that the application for deciding the maintainability of the proceedings as a preliminary issue does not raise either a disputed question of fact or a mixed question of law and fact. The application filed by the Petitioners proceeds on the basis that all the allegations contained in the application under Section 13A(2) may be read as they stand and it is on that basis it has been submitted that the Controller would, ex facie, have no jurisdiction. For the purpose of deciding the maintainability of the proceedings, the application would proceed on the basis that all the allegations which have been made in the plaint may be accepted and it is on that basis that jurisdiction has been challenged. At the present stage, it would not be appropriate or proper for this Court to expression any opinion on the merits of the case. It would

suffice to note that the application before the Controller cannot be regarded as frivolous. It does raise a valid question for adjudication as a preliminary issue.

17. The Petitions are accordingly allowed. The impugned orders passed by the Controller on 7th October, 2004 are quashed and set aside. The proceedings shall stand remitted back to the Controller who shall decide the issue of maintainability as a preliminary issue after giving to the parties a due opportunity of being heard. Both the Petitions stand disposed of. There shall be no order as to costs.